



JKCHR

Jammu & Kashmir Council for Human Rights

Jammu and Kashmir Situation

**Human Rights Council
Twenty-first Session**

Agenda item 3

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development...

P.O. BOX 241, London, SW17 9LJ, United Kingdom

t: 020 8657 3007

f: 020 8651 0071

e: info@jkchr.com

www.jkchr.com

Introduction

Jammu and Kashmir Council for Human Rights (JKCHR) has been returning to regular sessions of UN Human Rights Council (previous sessions of Commission on Human Rights (UNCHR) and the Sessions of *Sub-Commission on the Promotion and Protection of Human Rights*) on a regular basis ever since it reported to the UN on 10 January 1990 the first killing in Kashmir which took place between the night of 8/9 January 1990. On 4 April 1990 UN Commission on Human Rights invited JKCHR to substantiate its complaint and a 2 member delegation of JKCHR attended the first meeting at Palais des Nations in Geneva on 6 July 1990. The NGO discussed a 13 item agenda at the meeting.

JKCHR was elected at the UN World Conference on Human Rights in Vienna to represent the Unrepresented Peoples and Nations of the World. We addressed the Plenary and the Main Committee of the Conference. JKCHR was also elected on the UN-NGO Liaison Committee responsible for the substance and programme of the World Conference.

JKCHR has continued to sensitise respect for the full regime of Human Rights in all the three administrations of Jammu and Kashmir and has been representing Kashmiris in 19 countries. The NGO assists prisoners held in various prisons in and outside Kashmir and assists in arranging family visits of prisoners.

We have sponsored students from Kashmir for higher education in UK and have assisted other students in the State. There is a regular component of medical and humanitarian assistance in our service provision.

In December 1990 JKCHR launched its first medical and humanitarian assistance for the refugees living in various camps in Azad Kashmir (Pakistan administered) and invited delegations of international NGOs, in particular FIDH (France based) and WSV (German based) to see the refugees and victims of violations of human rights in various camps in Azad Kashmir. In January 1991 it set up first Treatment Centre at Muzaffarabad, Azad Kashmir to treat the victims of rape and torture and to assist their families.

JKCHR has a regional chapter in Srinagar and runs a Community Centre in the border district of Baramulla. The Centre became

operational since November 2004 and remains the first facility of its kind in this area since Kashmir dispute was raised at the UN in January 1948.

Our work remains focussed on the UN Jurisprudence of Kashmir Case and we remain in the lead in supporting the principle of 'equality' of people and right to self determination of all people of the State of Jammu and Kashmir distributed under three administrations on either side of cease fire line (LOC) and as a strong Diaspora living all over the world.

Jammu and Kashmir

We have highlighted the incompleteness of the Government of Jammu and Kashmir based at Srinagar. NGO continues to remind the Government that it does not reflect the territorial unity described in article 4 of the Constitution and that it has to address the incompleteness pointed out in article 48. At the same time it remains under a caution of UN Security Resolution of 30 March 1951.

J & K Government has a bilateral agreement (provisional) with the Government of India, permitting the admission of Indian Security Forces into the State, to protect 'life', 'honour' and 'property' in Kashmir. The terms of this bilateral agreement set out a discipline of these forces and the UN Security Council Resolution of 21 April 1948 describes the expected 'behaviour', 'number' and 'location' of these Indian forces. It has been stated at the UN Security Council that these are 'peace keeping forces', and according to the character of the bilateral agreement their role is supplemental and they remain sub-ordinate to the State administration. Jammu and Kashmir Government based at Srinagar has yet to transform itself into a role described in para 6 of UN Security Council Resolution of 21 April 1948.

Government of India under the terms of its October 1947 bilateral agreement (provisional) with the Government of Jammu and Kashmir to send its armies to assist the Government and protect people, its submissions made at the UN Security Council in February 1948 in explaining the role of its Security Forces in the State and UN Security Council Resolution of 21 April 1948 carries an immediate and higher burden of responsibility in protecting 'life', 'honour' and 'property' in Kashmir.

Azad Kashmir

The two administrations namely Azad Jammu and Kashmir (AJK) based at Muzaffarabad and Gilgit and Baltistan based at Gilgit administered by the Government of Pakistan, have failed to emerge as the kind of administrations envisaged in the UN mechanism on Kashmir. On the contrary Government of Pakistan has not only misdirected itself in understanding its role as a member nation of UN and as a party to the dispute in these areas but has used UNCIP Resolutions against the rights and interests of the people living in these territories.

The first violation of its role as a member nation of UN and first interference as a party to the dispute in the rights of the people came when certain elements in the Government of Pakistan, sabotaged the Republic of Azad Kashmir formed on 4 October 1947 and on 24 October 1947 instituted its own interest group through the reconstitution of the Republic. It did not even allow its own interest group in the government to honour and carry forward the Declaration of the Provisional Government of Azad Kashmir. The declaration addressed the two dominions of India and Pakistan in equity. It was inclusive for all communities.

Pakistan has not been able to discharge its share of obligations in Karachi Agreement of 28 April 1949 made with the Government of AJK and choosing one single political party Muslim Conference in regard to the administration of Gilgit and Baltistan. The role and consent of this political party in inking this Agreement continues to remain suspect because the General Council of this party had to be approved by the Government of Pakistan.

It continues in its breach of the Karachi Agreement and in its disrespect for the AJK superior judiciary decision on Gilgit and Baltistan directing the Government of Pakistan to allow the territory function as part of the AJK. It has failed to honour UN Security Council Resolution of 21 April 1948, directing the Government of Pakistan to “provide full freedom to all subjects of the State, regardless of creed, caste, or party, to express their views and to vote on the question of the accession of the State, and that therefore they should co-operate in the maintenance of peace and order.”

Pakistan has a role as a member nation of UN and as a party to the Kashmir dispute. Without offering a satisfactory explanation and without any attempt to settle many important concerns the Government of

Pakistan has assumed a role in the affairs of AJK under UNCIP Resolutions. The first most important role that Pakistan has assigned to itself has been in regard to giving the administration a Constitution.

It is instructional and masterly. On the one hand it admits that “future status of the Jammu and Kashmir is to be determined in accordance with the freely expressed will of the people of the State through the democratic method of free and fair plebiscite under the auspices of the United Nations as envisaged in the UNCIP Resolutions adopted from time to time”, and on the other it has discouraged any debate on the best interests of the Kashmiri people living in the two administrations namely, AJK and Gilgit and Baltistan. It has not allowed to question Pakistan and the Government of AJK to explain if any progress has been made under the stated pledge made in the “The Azad Jammu & Kashmir Interim Constitution Act 1974”.

The AJK Constitution is a compulsory direction from the Government of Pakistan. Such a colonial attitude and binding prescription is unrecognizable under UNCIP Resolutions. Article 4.4.7 in AJK Constitution does not allow a common citizen the full freedom of expression or association as endorsed by UN General Assembly for freedom of choice in an election. Non State Subjects (Pakistani nationals) have retained exclusive legislative and executive control in the area. Article 19 (2), 21, 31 (3) and article 56 of the AJK Constitution seal its fate in favour of the establishment in Pakistan and pronounce the people living in AJK as colonial subjects.

Although Government of Pakistan justifies that it has assumed a role in AJK in the discharge of its responsibilities under UNCIP Resolution, yet the vires of this claim have never been examined. This claim does not reconcile with the administrative set up envisioned for these territories in Part II A (3) of 13 August 1948 UNCIP Resolution.

Accordingly, “pending a final solution the territory evacuated by Pakistan troops will be administered by the local authorities under the surveillance of the Commission”. Government of Pakistan has not only acted against the spirit of the UNCIP Resolutions in the areas currently under its control, but has equally failed to seek a political set up at Srinagar as provided in para 6 of the UN Security Council Resolution of 21 April 1948.

Azad Kashmir came into existence on 4 October 1947. Pakistan interfered in the process at the very beginning and managed a

reconstitution of AJK Government on 24 October 1947. The latter was a temporary arrangement to restore law and order to enable the people to elect by their free vote a popular legislature and a popular Government.

It was to be a non communal Government with proper non Muslim representation in the cabinet. The declaration of the provisional Government on 24 October 1947, that, "The Provisional Government which is assuming the administration of the State is most emphatically not a communal Government. It will include Muslims as well as non Muslims in the provisional Cabinet which will serve the people, the temporary purpose of restoring law and order in the State and enable the people to elect by their free vote a popular legislature and a popular Government", was secular and all inclusive.

AJK leadership did not have the State apparatus at its command. It failed to enforce the terms of the popular Declaration of the Provisional Government. On the contrary in January 1951 Rules of Business were introduced to govern the transaction of government departments. These rules were treated as the Constitution.

Rule 5 provided that "The President shall hold office during the pleasure of the General Council of the All Jammu and Kashmir Muslim Conference, duly recognised as such by the Government of Pakistan and the Ministry of Kashmir Affairs". These rules were amended on 29 November 1958 but the provision of rule 5 remained intact.

It is interesting to state that people in the area who had just finished with their Quit Kashmir struggle against the Maharaja and had graduated into many political achievements, seemed to have lost all and came under a new colonial authority. A struggle for democratic rights in these areas began and remained in full force from 1950-1960. People faced a new regime of repression.

Political activists were arrested and news paper titles were cancelled under the direct interference of the authorities in the Government of Pakistan. A series of control instruments in the form of 1964 Act, 1968 Act, 1970 Act and ultimately 1974 Interim Act were introduced to control the habitat and people.

The control mechanism was so tight that under Act 1964, the State Council could not undertake any legislation without the prior consent of the Chief Advisor – an appointee of the Government of Pakistan. No law could take effect unless the Chief Advisor directed so by a Notification.

He was also empowered to restrict its application to any part of the territory and make any changes. The elected members of the State Council existed on paper only.

Act 1968 provided for the setting up of a new State Council consisting of 12 members. The refugee representation was slashed from its original $\frac{1}{2}$ to $\frac{1}{3}$. The method of election on refugee seats remained undemocratic. Members from Azad Kashmir were to be elected by basic Democrats, while the 4 refugee members (2 each from Jammu and Kashmir refugees) were to be nominated by the Chief Advisor, on the recommendation of the Azad Kashmir President.

One of the members was to be elected as Chairman of the Council who was also to function as ex officio President of Azad Kashmir. The refugee representation became undemocratic and subject to the choice of two masters, namely, the President and the Chief Advisor. The refugee representation in the AJK Assembly and AJK Council continues to be suspect even today.

People challenged the merits of Act 1968. Workers of Liberation League were arrested and banished for months to 7000ft high Leepa valley. Journalists like Khawaja Sona Ullah Bhat and his four colleges were arrested for their expressed opinions in Muzaffarabad, rigorously interrogated by secret agencies and later unlawfully deported from AJK territory back into Jammu and Kashmir.

People in the area were served with Act 1970 and Act 1974. The 12 member refugee representation in the house of 48 in Act 1974 has an ineffective and unimpressive history in protecting the rights of the refugees and advancing the process of resolution of Kashmir case. These 12 people have never been the vox populi in the assembly. They are used by the Governments in power in Islamabad to influence the legislative behaviour in AJK and install a government of its liking in the area.

Government of Pakistan under UNCIP Resolution has a responsibility to “provide full freedom to all subjects of the State, regardless of creed, caste, or party, to express their views and to vote”. It entails that there is an immediate responsibility under The General Assembly resolution 46/137 of 17 December 1991 recognising that “periodic and genuine elections are necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the

government of his or her country is a crucial factor in the effective enjoyment by all of a wider range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights”.

Article 4.4.7 in AJK Constitution does not allow a common citizen in Azad Kashmir the full freedom of expression or association as endorsed by UN General Assembly for freedom of choice in an election. Government of Pakistan as an author of this restraint on the transfer of free will in an election has violated article 21 (3) of the Universal Declaration of Human Rights. It envisages that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”.

The restraint in the Constitution remains in conflict with the spirit of the UN Secretary Generals’ report A/46/609 and Corr.1 par.76 stating that, “Elections in and of themselves do not constitute democracy. They are not an end but a set up, albeit an important and often essential one, on the path towards the democratisation of societies and the realisation of the right to take part in the governance of one’s country as enunciated in major international human rights instruments. It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country”.

There is no evidence that Kashmiri leaders from all or any one of the three administrations have ever asked Government of Pakistan to tabulate the discharge of its duties assumed under UNCIP resolutions in the affairs of AJK and Gilgit and Baltistan. On the contrary Pakistani establishments have remained the secret hands to dislodge the provisional Governments of AJK established on 4 October 1947 and re-constituted on 24 October 1947.

The all inclusive provisions of the declaration of the provisional AJK Government were gradually written off and a colonial instrument of control in the form of Act 1974 was handed over by the Government of Pakistan to the President of AJK, with a masterly instruction stating, “in the discharge of its responsibilities under the UNCIP Resolutions, the Government of Pakistan has approved the proposed repeal and re-enactment of the said Azad Jammu and Kashmir Government Act 1970, and authorised the President of Azad Jammu and Kashmir to introduce

the present Bill in the Legislative assembly of Azad Jammu and Kashmir for consideration and passage”.

Various governments in Pakistan have sussed out the lack of understanding of Kashmir case by Kashmiri leaders and their preparedness to continue with their double standard. On the one hand it did not allow the UN mechanism to take shape in any part of Kashmir and at the same time failed to restrain the authorship of militancy in Kashmir. It has resulted in the death of a generation and in the death of self-determination for a long time to come.

Kashmiri leaders have been encouraged to continue to live with their double standard of ignoring the best interests of the Kashmiri people living in the two administrations under Pakistan control, namely, AJK and Gilgit and Baltistan. They have avoided (for private and personal reasons) to question Pakistan and the Government of AJK to explain any progress made under the stated pledge made in the “The Azad Jammu & Kashmir Interim Constitution Act 1974”.

People living in the territories administered by the Government of Pakistan do not enjoy rights and interests as ‘equal people’ but have been reduced to as colonial subjects. In theory they have a right as equal people to ‘self-determination’ but in practice the Constitutional restraints placed in the AJK Constitution Act 1974 by its authors under articles 4.4.7, 19(2), 31 (3) and 56, help the non State Subjects to take away all legislative and executive authority from the people of the State. These restraints in aggregate and article 4.4.7 in particular attract the caution given to J & K Assembly in the UN Security Council Resolution of 30 March 1951.

The Constitutional partnership in these territories and the role of the Government of Pakistan here is a further violation of article 257 of the Constitution of Pakistan. The Constitutional wisdom in this article recognises the freedom of choice of the people of Kashmir. It states, “When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State”.

This signifies that there will be no automatic merger of the territories of the State with Pakistan and the conditions under which other States acceded to Pakistan will not necessarily apply to the State, if the people of the State are not in favour of such application. The terms of the instrument of accession will be determined by mutual agreement.

It is important to point out that the three assemblies functioning at Srinagar, Muzaffarabad and Gilgit are elected from only a part of the whole territory of the State of Jammu and Kashmir. The territories of the State are defined in article 4 of the Jammu and Kashmir Constitution and the incompleteness of these three assemblies is fully recognized in the caution of UN Security Council Resolution of 30 March 1951.

Accordingly India and Pakistan under the provisions of UNCIP resolutions of 13 August 1948 and 5 January 1949 have affirmed that “the future of the State of Jammu and Kashmir shall be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations”.

The UN Security Council Resolution of 30 March 1951 has recognised the incompleteness of the Srinagar assembly elected from only a part of the whole territory of Jammu and Kashmir and the principle makes the other two assemblies elected at Muzaffarabad and Gilgit also incomplete. This resolution has warned that, “any action that assembly (at Srinagar) might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State in accordance with the above principle”. The same principle upholding the infirmity of one assembly applies to the other two assemblies which remain under the administrative control of Pakistan.

Therefore, the embedded interest in the restraint in article 4.4.7 of the Constitution Act 1974 is a violation in the discharge of responsibilities envisioned under UNCIP resolutions by the Government of Pakistan. It violates the affirmation given at the UN and duly recorded in Security Council Resolutions 47 (1948) of 21 April 1948, 51 (1948) of 3 June 1948 and 80 (1950) of 14 March 1950 and the UNCIP resolution of 13 August 1948 and 5 January 1949 in respect of the final disposition of the State of Jammu and Kashmir.

The principle about the equality of the people of Kashmir in their right to self determination and importance of peace and security is as true today as it was at the time of passing the UN Security Council resolution 91 (1951) of 30 March 1951. The Security Council declaration, that, “it is the duty of the Security Council in carrying out its primary responsibility for the maintenance of international peace and security, to aid the parties to reach an amicable solution of the Kashmir dispute and that a prompt settlement of this dispute is of vital importance to the maintenance of international peace and security”, remains in the best interests of the

constituency of shared peace between the people of India, Pakistan and Kashmir.

People of Jammu and Kashmir need to be empowered in the manner set out in UN mechanism on Kashmir. Jammu and Kashmir Government seated at Srinagar and the other two governments situated at Muzaffarabad and Gilgit need to be shaped as provided in this mechanism. Government of Pakistan has to define its role under UNCIP resolution in AJK and Gilgit and Baltistan.

It has to withdraw the area of benefit and authority that it has created in violation of UNCIP resolutions and in violation of article 257 of its Constitution in the administration of these territories. The share and control in the legislature and executive retained by non State Subjects and enjoying immunity from accountability of any manner in AJK or in Pakistan, is an extreme form of colonial control in these areas. The broad spread of this embedded interest needs to be withdrawn without delay and the men and women in these territories have to be allowed their basic right of being 'equal' and 'free' from any restraint.

India and Pakistan have intra State responsibilities in respect of protecting the rights and interests of the people of Kashmir living in all the three administrations. A legitimate state has to adequately protect its constituents' human rights and respect the human rights of all others. It is one of the 'requisite political functions'. It is only on this basis that a state has a political legitimacy – the right to rule a territory, free of external interference – but it is subject to the ability and willingness of a population to perform the requisite functions by establishing and maintaining institutions that satisfactorily protect and respect human rights.

Although Government of J & K has continued to fail for the past 56 years in its duties under articles 4 and 48 of the Jammu and Kashmir Constitution, Government of India took a formal interest in 2001 in regard to its intra State responsibilities in respect of protecting the rights and interests of the people of Kashmir. Prime Minister of India Mr. Atal Bihari Vajpayee on 23 October 2001 made a statement on the 'condition', 'democracy', 'rights of the people', elections and transfer of 'power' in the 'area occupied by Pakistan'. Prime Minister of India called Pakistan an 'opportunist country'.

Governments of Pakistan have also continued an intra State interest in the habitat and people of Kashmir. Pakistan has a lead claim that it is

(and would continue) providing a political, diplomatic and moral support to the rights movement in Kashmir. However, the Government of Pakistan does not like to be reminded that it decided to ignore the issue from 5 November 1965 – 15 September 1996. Kashmir was not raised at the UN for 30 years and 10 months, making Pakistan a truly 'opportunist country'. Support of a failed militant resistance, too seems to have been a tactical move in its own interest. The interest has been a tactical tit for tat against India, than a genuine and enduring faith in the 'equality' of the people of Kashmir in their title to self-determination.

Pakistan and India (Pakistan in particular) have to answer a finding made by Adrian Levy and Cathy Scot-Clark in their book "The Meadow" published in June 2012 in regard to their 'Game' in Kashmir. At page 357 the book reads, "India and Pakistan fought each other in the Valley by manipulating the lives of others. Everything that happened here involved acts of ventriloquism, with traitors, proxies and informers deployed by both sides, and civilians becoming the casualties". The book further reads, "Pakistan called it the Game. Pakistan tried something, India blocked it and turned it around, or the other way around, and there were so many angles to it, that really when you were playing it you forgot yourself completely, until it seemed like the most beautiful thing in the world".

Pakistan and its proxies have to address the charge brought against them that "The overwhelming strategy of the Game, was to use any means necessary to sow confusion, hatred and suspicion between the different religions, races and competing militant outfits in Kashmir, so that no one group dominated, and all remained weaker than India's security forces".

The description raises the question of liability in causing the death of a generation and the death of self-determination. Authors and instruments of this "game" are responsible for this double murder. It is a 'rare of rarest crimes' and without pardon.

A forcible annexation of a people is similar to colonial conquest. Regardless of how well or poorly the dominant state treats the inhabitants of the political communities that it has forcibly absorbed, the coerced take over constitutes an unjustified interference with the collective right of self-determination of the oppressed population.

The two countries have a duty to restore the Kashmiri peoples' capacity to perform the requisite political functions. Reparation is due to the

people and the two member nations of UN have an obligation to pay. Such reparation is owed, regardless of whether a population needs it in order to perform the requisite political functions. In case, if the inability to perform the requisite functions is found due to the unjust colonialist exploitation of resources, then it is not understood to be as denying a right of political self-determination but rather as demanding the necessary restitution.

India and Pakistan as member nations of UN, all other nations and the civil society have a role to assist India and Pakistan to stop being blinkered by the “Enemy Images” of each other. They need help to unlock their men and women, otherwise locked in an atmosphere of suspicion and divert the freed resources to development, health, education, elimination of hunger and peace projects.

In addition to their Charter obligations towards the principle of ‘equality’ and ‘right of self-determination’ of peoples, respect for the rights and interests of the people of the state of Jammu and Kashmir has to be the most immediate subject in their intra state responsibilities.

KASHMIR

Regional Chapter: Rose Avenue, Peer Bagh, Srinagar, Kashmir
Email: kashmirchapter@jkchr.com, jkchr.kashmir@gmail.com
Phone: 0091 194 2105927, 2433032 Fax: 0091 194 2431262

LONDON

Head Office: P.O. Box 241, London, SW17 9LJ, United Kingdom
Email: info@jkchr.com
Phone: 02086 573 007 Fax: 02086 510 071

GENEVA

Case Postale 39, 1211 Geneva 17, Switzerland

PAKISTAN

E-43/3 E Block, Satellite Town, Rawalpindi, Pakistan
Email: pakistanchapter@jkchr.com
Phone: 0092 514 455638 Fax: 0092 514 412744